difficulty in my mind arose from the fact that that power might lead to the disappearance of the whole fund. I am satisfied, however, on consideration, that it is not the right view to hold that there was postponement of vesting.

LORD M'LAREN—The chief difficulties in the interpretation of the settlements which have been under consideration in this case have relation to the holograph writing of Mr Reddie of April 1873. In dealing with cases on holograph testamentary writings we sometimes have occasion to say that the testator has failed to express his intention fully. In the present case the testator has intended to be lucid by using a great number of words to express his meaning, but has not succeeded in doing so without the assistance of the Court being invoked.

On one point I think the testator has made himself clear—I mean in limiting the fund of which he disposes to £3000.

In regard to the other points, I concur in the main with the Lord Ordinary except as to the question of vesting, on which I agree with your Lordship.

I should assent to the proposition that where a gift of residue is made subject to the exercise of an unqualified power of disposal given to some other person, it is impossible that the right to the residue should vest so long as that power subsists, because the amount to be taken by the legatee is wholly uncertain; indeed, it is in doubt whether he will receive anything. But when the power of disposal is confined to certain specified purposes, and is only to be used in certain circumstances, then I think it is consistent with previous decisions that vesting may exist concurrently with the existence of the power.

In the present case I think the power which was given to the surviving spouse, who was the wife, to use or encroach upon the residuary fund meant nothing more than this—that if her own share of the estate should turn out to be insufficient for her subsistence according to her accustomed mode of living she should have power to draw upon the fund which was destined by the testator to his own heirs. While the restriction in question does not admit of very clear definition, it is, I think, perfectly intelligible. The testator conferred a limited power of expenditure upon his wife for her comfortable maintenance, the exercise of which might have been restrained by a court of law if an attempt had been made to extend it beyond these limits.

The presumption is always in favour of vesting, and for the reasons I have given I think there was vesting *a morte testatoris*.

LORD SHAND was absent on Circuit when the case was heard.

The Court recalled the third finding of the Lord Ordinary's interlocutor of 6th February 1889, and in place thereof found that the special legacies and bequests of residue contained in Mr Reddie's holograph testamentary writing vested at the death of the testator, the said James Reddie, on 5th February 1876; *quoad ultra* adhered to the said interlocutor and ranked the claimants in accordance with the findings as altered.

Counsel for Margaret Lindsay and Others—Galbraith Miller. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for Janet Lindsay and Others—Forsyth. Agent—James Forsyth, S.S.C.

Counsel for James Stenhouse and Others—Shaw. Agent—James Marshall, S.S.C.

Counsel for Ann Jean Lindsay—Watt. Agent—P. H. Cameron, S.S.C.

Counsel for Elizabeth Lindsay or Allan—Cooper. Agents—Buchan & Buchan, S.S.C.

Counsel for John Gifford Purves and Others—Gillespie. Agents—Dundas & Wilson, W.S.

Counsel for Alexander Reddie and Jessie Reddie—H. Johnston—Dundas. Agents—Henry & Scott, S.S.C.

Counsel for John Watson and Others—Gillespie. Agent—William Graham, L.A.

Counsel for Jessie Corrigill and Others (the Residuary Legatees of Mrs Reddie)—Low—MacWatt. Agent—Alexander Morison, S.S.C.

Counsel for Elizabeth Carnegie—Law. Agents—Macrae, Flett, & Rennie, W.S.

Friday, March 14.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

CAMPBELL *v.* DEANS AND OTHERS.

Feu-Charter—Clause of Allocation of Feu-duty — Singular Successor — Heritable Creditor—Conveyancing and Land Transfer Act 1874 (*37 and 38 Vict. cap.* 94), *sec.* 4.

A proprietor feued out certain ground for payment of a certain feu-duty by the vassal and his heirs and successors whomsoever, who were also taken bound to erect on the ground disponed, within twelve months from the term of entry, houses of not less than a total value of £2500. It was further declared in the feu-charter that heirs or singular successors acquiring right to any part or portion of the ground feued should be subject to the whole conditions contained therein, and should be bound to pay to the superior a rateable proportion of the *cumulo* feu-duty, for which proportion only they should be bound. The vassal erected houses of the required value, upon the security of which he borrowed certain sums, for which he granted bonds and dispositions in security over the plots on which the houses were built. The interest on the loans subsequently fell into arrear, and the bondholders having entered into possession, claimed right to pay only

the proportion of the feu-duty applicable to the ground disponed to them in security—a right which the superior refused to acknowledge. The vassal thereafter granted absolute dispositions of the security subjects in favour of the bondholders, who again claimed allocation of the feu-duty, which was again refused.

In a declarator of irritancy *ob non solutum canonem* brought by the superior against the vassal, and the bondholders for their interest—*held* (1) that the bondholders were not, as such, entitled to the benefit of the clause in the feu-charter by which singular successors were made liable for a rateable proportion only of the *cumulo* feu-duty, but (2) that they were entitled to the benefit of the said clause after the absolute dispositions in their favour had been granted by the vassal.

Opinion (*per* Lord Kinnear) that the implied entry introduced by the Conveyancing and Land Transfer Act 1874, section 4, applied to the case of persons holding bonds and dispositions in security.

By feu-charter dated 12th December 1876, granted under the authority of the Court of Session, Mrs Bouverie Campbell, as heiress of entail in possession of the entailed estate of Dunoon, and with consent of her husband Lieutenant-Colonel Bouverie Campbell, disponed to Peter Deans, and his successors whomsoever, a piece of ground, part of the estate of Dunoon, consisting of 3 acres 1 rood 18 poles and 11 square yards, for payment of the yearly feu-duty of £33, 13s. at the term of Whitsunday. It was provided in the feu-charter, *inter alia*, that Peter Deans should erect within twelve months after the term of entry dwelling-houses or villas of not less than a total value of £2500. The charter also contained the following declarations—"And further declaring that no composition or entry-money or other casualty of superiority shall be exigible from any heir or from any singular successor in the said subjects or any part thereof: And further declaring that heirs or singular successors acquiring right to any part or portion of the ground hereby feued shall be subject to the whole burdens, conditions, provisions, declarations, and obligations contained in these presents and in the foresaid Acts of Parliament, and shall be bound to pay to me, the said Caroline Mary Hetley Pleydell Bouverie Campbell, annually, at the term of Whitsunday, a rateable proportion of the *cumulo* feu-duty payable under these presents, for which proportion only they shall be bound, and these for all other burden, exaction, demand, or secular service that can be exacted by me or my foresaids furth of the said subjects hereby feued."

Peter Deans erected on the ground disponed two houses of the total value of £2500 or thereby, the one house occupying a plot of 1 rood 11 poles and 11 square yards, and the other a plot of 1 rood and 12 poles, leaving unbuilt upon ground exceeding 2 acres in extent. Upon the security of these houses Deans borrowed two sums of £950 and £938, for which he granted two bonds and dispositions in security dated 9th and recorded 10th February 1877, the first in favour of the trustees of the deceased John Kinross over the plot of ground first mentioned above, and the other over the plot of ground second above mentioned in favour of Mrs Buchanan, Mrs Robertson, and Mrs Carslaw. Peter Deans having fallen into embarrassed circumstances, and the interest on the loans having fallen into arrear, the bondholders entered into possession of the security subjects. At first the bondholders paid to Mrs Campbell of Dunoon the feu-duty applicable to the whole ground contained in the said feu-charter, but in July 1884 they claimed right to pay only the proportion of the feu-duty applicable to the ground upon which the houses were erected, and requested repayment of the sums paid by them in excess thereof. Mrs Campbell refused to acknowledge such a right on the part of the bondholders.

By disposition dated 10th December 1884 Peter Deans disponed to the trustees of John Kinross the plot of ground containing 1 rood 11 poles and 11 square yards, and by another disposition of the same date he disponed to Mrs Robertson and Mrs Carslaw (Mrs Buchanan having died) the plot of ground containing 1 rood and 12 poles. These dispositions were not recorded when the present action was raised.

On 30th September the agents for the bondholders sent these dispositions to the agents for Mrs Campbell, accompanied by the following letter—"We have to request that you will write a memorandum of allocation upon the former of these dispositions, allocating thereon a feu-duty of £3, 5s. 0½d., and a memorandum of allocation upon the other disposition, allocating thereon a feu-duty of £3, 4s. 3d. In the meantime be so good as acknowledge receipt of the dispositions. We shall found upon the request now made, and decline payment of any further feu-duty than the sums so requested to be allocated."

Mrs Campbell's agents replied on 1st October as follows—"We are favoured with your letter of the 30th ult. We regret we cannot agree with you in this matter, and we suppose the Court of Session will have to settle the question at issue, which, however, cannot be tried until after Whitsunday next, when the next year's feu-duty becomes payable. We return the two dispositions sent with your letter."

Thereafter the agents for the bondholders wrote again as follows—"We have yours of yesterday, returning the two dispositions which we sent you on the 30th ult. You will understand we shall found upon the request which has been made for allocation of the feu-duty." They also tendered payment of the feu-duty in accordance with the allocation requested by them, but the superior refused to accept such payment.

In August 1888 the present action was raised by Mrs Campbell with consent of her husband against Peter Deans, and also against the trustees of John Kinross, Mrs

Robertson, Mrs Carslaw, and the executors of Mrs Buchanan for their interest. The summons concluded for declarator that the feu-duty payable by the defender Deans had not been paid for the four years prior to Whitsunday 1888, and that the defender Deans had therefore incurred the statutory irritancy, and had amitted and tint his feu, and all right and title *ob non solutum canonem* to the subjects feued, and should be ordained immediately to remove therefrom. There was also a conclusion for expenses against all the defenders in the event of their appearing and opposing the conclusions of the summons.

The pursuer stated the arrears of feu-duty as follows—"The sum of £33, 13s. due at the term of Whitsunday 1885 for the year preceding, and the like sum of £33, 13s. due at each term of Whitsunday thereafter, down to and including the term of Whitsunday 1888," making together the sum of £134, 12s."

The defenders other than Deans appeared and lodged defences.

They pleaded—"(2) Upon a sound construction of the said feu-contract the defenders, as singular successors of Peter Deans, are only liable in payment of the proportion of the feu-duty effeiring to the plots of ground conveyed to them respectively. (3) The defenders having tendered payment of the feu-duty payable in respect of the ground conveyed to them respectively, should be assoilzied with expenses."

The Lord Ordinary (KINNEAR) on 28th March 1889 sustained the second and third pleas-in-law for the defenders other than Peter Deans, and assoilzied them from the conclusions of the action.

"*Note.*—The question is, whether the defenders other than Peter Deans are singular successors in the sense of the feu-charter, so as to have the benefit of the stipulation by which such successors acquiring right to any portion of the ground are made liable for a rateable proportion only of the *cumulo* feu-duty. The infeftment of creditors upon a bond and disposition in security is a mere burden upon their debtor's right, and therefore it is said that they are not his successors in any proper sense of the word. I should think this observation correct if the creditors' infeftment had not been confirmed by the superior. But if a vassal has conveyed his land, or a part of it, to a disponee, and the disponee has been duly entered, it cannot be disputed that such disponee is a singular successor, whether his right is redeemable or irredeemable. The feudal right has in that case been effectually transmitted, and the disponee holds it by a particular title; and this satisfies Mr Erskine's definition of a singular successor (i., 7, 1). Mr Erskine does not mention dispositions in security among the particular titles specified in this passage, but he mentions adjudication, which has the same effect in law, because it has long been settled that adjudication, though completed by charter and sasine, continues during the legal term of redemption to be a mere judicial security, as distinguished from a sale under reversion—*Grindlay* v. *Drysdale*, 11 S. 896; *Mackenzie* v. *Ross and Ogilvie*, M. 275.

"The question, therefore, would appear to me to depend upon whether the defenders' right has been confirmed by the operation of the 4th section of the Conveyancing Act of 1874. I think it must be held to have been so confirmed, because the defenders are duly infeft in the lands, and the rights confirmed by implication of the statute include all the interests requiring and admitting of an infeftment duly recorded in the appropriate register of sasines. It is true that by the former practice the creditor in a bond and disposition in security did not generally find it necessary to enter with the superior, because bonds were not usually granted with an *a me* holding only. But it was competent to enter if it were necessary, and it would have been a sufficient reason for taking an entry, that by the terms of the original charter the superior's right to feu-duty was subject to restriction in the event of a subdivision of the feu. By the former law, therefore, the defenders would have been in a position to protect their own interest by applying for confirmation if they were apprehensive that their security might be endangered by their debtor's failure to pay the full feu-duty. The charter which in that event they would have obtained would have resembled the confirmation of an absolute right, 'except in regard to the quality of the right, which would have been declared to be redeemable in terms of the bond'—(see Duff on Conveyancing, 4, 311). But on giving the charter the superior might have been required to allocate the feu-duty; and the defenders are in the same position, by the operation of the statute, as if they had obtained such a charter.

"This result is in no way inconsistent with the judgment of the House of Lords in *Sandeman* v. *The Scottish Property Investment Company*. What is decided in that case is that a subordinate right must be subject to the conditions on which the original feu-right was created. But it is by reason of the conditions of the feu that the defenders are in a position to maintain that the superior's right is limited, in a question with them, to the proportion of feu-duty applicable to the subjects in which they are infeft.

"It is said that the condition on which the defenders rely has not been brought into operation because their author's obligation to build has not yet been fully performed. But there is nothing in the charter to prevent the vassal from disposing of the houses already built, or to deprive his disponees of the right conferred upon singular successors, notwithstanding that other buildings must be erected on other portions of the ground in order to satisfy the obligation to build."

The pursuer reclaimed, and argued—The defenders in their character of bondholders were not entitled to the benefit of the clause of allocation in the charter, as they were not singular successors in the meaning of that clause, though perhaps they might be termed singular as opposed to

universal successors. Their right was a mere burden on the right of the vassal, their debtor, and they were not successors at all in the lands. The creditor's infeftment did not evacuate the infeftment of the debtor. A bond and disposition in security was discharged by words of simple discharge—Bell's Comm. ii. 1185. The sum paid by apprisers and adjudgers who applied to the superior for confirmation was paid in name of fine for entry, and not on account of vacancy in the feu—Acts 1469, c. 46, 1669. c. 18, 1672, c. 19; Duff's Feudal Conv., p. 310. Erskine in the passage founded on by the Lord Ordinary classed adjudgers among singular successors, but that was because he held adjudications to be truly sales under reversion—Ersk. Inst., ii., 12, 41, 42, 45. The implied entry given by section 4 of the Conveyancing and Land Transfer Act 1874 did not apply to the holders of bonds and dispositions in security. There was an implied contrast between sub-sections 1 and 2 of section 4, the word "proprietor" being used in the latter and not in the former. Section 53 dealt with a special case, and only put the creditor's disponee in the same position as the original creditor. If the latter had never been entered the former would not be. Assuming, however, that heritable creditors were impliedly entered under section 4, the question arose, with whom were they entered? And it might be very well maintained that they were entered with their debtor. No doubt heritable creditors under the old law could go to the over-superior and request to be entered, but it very rarely happened that it was their interest to do so. (2) The dispositions of 1884 were granted because the reversion was not worth anything, and it was open to inquire whether they were not taken for the mere purpose of fortifying the creditors' position. Section 8 of the Act of 1874 did not apply to such a case. (3) Allocation of the feu-duty could not be demanded till the ground was all built upon or apportioned to buildings.

Argued for the defenders and respondents —(1) A singular successor was a person who acquired by a singular title, and there was no reason why the term should not include a person holding a redeemable title—Ersk. Inst. ii. 7, 1, iii. 8, 1; Stair, iii. 3, 1; Bell's Prin. 719, 732. Heritable creditors had also a right to enter with the superior on payment of one year's rent among them, and the older styles of bonds expressed the feudal executive clauses at length. Thus, although the infeftment of the creditor did not evacuate the infeftment of the debtor, the creditor had to pay the casualty due for entry, just as if he had succeeded by another title. The bondholders here were therefore singular successors in the meaning of the clause in the charter—Dallas' Styles, 698; Ross' Lectures, ii. 388; Ersk. ii. 12, 24; Stair, ii. 4, 32; Transfer of Land Act 1847, sec. 6; Titles to Land Consolidation Act 1868, sec. 97; Begg's Convey. Code, sec. 105; Duff's Feudal Convey., p. 310; *Sandeman* v. *Scottish Property Investment Company*, February 21, 1883, 10 R. 614, *per* Lord Rutherfurd Clark, 632; *Cassels* v. *Lamb*, March 6, 1885, 12 R. 722., *per* Lord President, 798; *Grindlay* v. *Drysdale*, July 4, 1855, 11 S. 896, 7 Bell's App. 65; *Stuart* v. *Jackson*, November 15, 1889, 17 R. 85, opinion of Lord President, p. 98; *Hunter* v. *Connell's Trustees*, July 1, 1885, 10 R. 1110. The implied entry given by the Act of 1874 applied to the holders of heritable securities. The 1st and 2nd sub-sections of section 4 were intended to be correlative, the 1st abolishing entry by the old forms, the 2nd giving the new entry in its place. The word "proprietor" in the 2nd sub-section was merely a short way of describing what in sub-section 1 required 2 lines to describe—*cf.* sec. 55. The word "conveyance" included bond and disposition in security—1874 Act, sec. 3, sub-secs. 4 and 5; 1868 Act, sec. 3, sub-sec. 7. The alternative manner of holding was abolished by the 1874 Act, under which the only manner of holding was *a me*—Bell's Comm., i. 694. (2) The dispositions of 1884 were absolute dispositions, and under them the disponees were clearly singular successors of the original vassal, and entitled to demand allocation of the feu-duty —1874 Act, sec. 8.

At advising—

Lord President—This action is a declarator of irritancy *ob non solutum canonem*, and it is directed against the vassal in the feu-right and also against certain other defenders who are heritable creditors under bonds and dispositions in security which they have obtained from the vassal. These defenders have also another title, but it is necessary first of all to consider their position in the character of creditors under bonds and dispositions in security with regard to the questions raised in the case.

The Lord Ordinary has sustained the second and third pleas for the defenders, the vassal himself not having appeared, and has assoilzied them. The second plea is this—"Upon a sound construction of the said feu-contract, the defenders, as singular successors of Peter Deans, are only liable in payment of the proportion of the feu-duty effeiring to the plots of ground conveyed to them respectively." And the third plea is—"The defenders having tendered payment of the feu-duty, payable in respect of the ground conveyed to them respectively, should be assoilzied, with expenses." These pleas are founded on a particular clause in the original feu-contract, by which it is provided, in the first place, that "no composition or entry-money, or other casualty of superiority, shall be exigible from any heir or from any singular successor in the said subjects, or any part thereof;" and further, "that heirs or singular successors acquiring right to any part or portion of the ground hereby feued shall be subject to the whole burdens, conditions, provisions, declarations, and obligations contained in these presents and in the foresaid Acts of Parliament, and shall be bound to pay" to the superior "a rateable proportion of the *cumulo* feu-duty payable under these presents, for which proportion only they shall be bound."

Now, the question comes to be, whether

the defenders, as heritable creditors under bonds and dispositions in security, fall within this clause, and that depends on whether they can describe themselves accurately as heirs or singular successors of the original feuar. It is quite clear they are not heirs, and accordingly the question depends on whether they can fairly claim to be considered singular successors. The Lord Ordinary relies first on a passage in Mr Erskine's Institutes for the meaning of the term "singular successor," and he refers to book ii., tit. 7, sec. 1, with reference to which he says—"Mr Erskine does not mention dispositions in security among the particular titles specified in this passage, but he mentions adjudication, which has the same effect in law, because it has long been settled that adjudication, though completed by charter and sasine, continues during the legal term of redemption to be a mere judicial security as distinguished from a sale under reversion." Now, the passage to which the Lord Ordinary refers is thus expressed—"A vassal may transmit his right either upon his death, to his heirs, of which afterwards, or while he is yet alive, to those who acquire by gift, purchase, adjudication, or other particular title. He who thus transmits a feudal right in his lifetime is called the disponer or author, and he who acquires it the singular successor, because he succeeds to that subject by a singular title." Now, unfortunately the Lord Ordinary has omitted to notice that Mr Erskine's doctrine with regard to the nature of adjudication differs from what has been settled in more modern times. In another passage Mr Erskine states that adjudications are truly sales under reversion. If that were so, then an adjudger would be a singular successor, but it is not so, as it is distinctly settled that an adjudger is only a heritable creditor, and stands in an analogous position to the disponee under a bond and disposition in security—that is to say, he is a mere incumbrancer on the vassal's right. Mr Erskine's authority therefore is rather against than for the Lord Ordinary's view, because unquestionably Mr Erskine does not class among singular successors any persons who are mere incumbrancers or holders of bonds or securities over the vassal's right.

But the Lord Ordinary further says—"The question therefore would appear to me to depend upon whether the defenders' right has been confirmed by the operation of the 4th section of the Conveyancing Act of 1874;" and he proceeds, "I think it must be held to have been so confirmed, because the defenders are duly infeft in the lands, and the rights confirmed by implication of the statute include all the interests requiring and admitting of an infeftment duly recorded in the appropriate register of sasines." Now, that raises a question which may be of some interest, and which it may be necessary hereafter to determine, namely, whether the implied entry of the Act of 1874 applies to the case of heritable creditors, but it is not necessary to decide that question in the present case, for it appears to me that there are clear grounds for holding that heritable creditors are not singular successors in the meaning of the feu-charter with which we have to deal.

The contract in question here is a feu-contract containing obligations on the one hand and benefits on the other, but a party holding a mere right of incumbrance or security over the ground disponed does not become a party to the feu-contract, and cannot without becoming the owner of the feu. He is not owner of any part of it, but is merely in the situation of holding a security with a power of sale, that is, he has a mandate from the owner to sell the incumbered estate. It is just because he is merely an incumbrancer that he acquires no right to dispose of the property but for the mandate he holds from the owner. The consequence is, that as he is not a party to the feu-contract, and cannot as a heritable creditor become a party to it, he can take no benefit or advantage from its terms. No doubt, if under the security title he enters into possession of the lands, he will become liable for the feu-duty and other obligations under which the lands were disponed. His liability, however, will be created, not by his title, but by his intromissions. In short, it appears to me that a security title, such as I am at present considering, does not transfer to the holder anything belonging in property to the feuar, and does not bring the holder of the security into a relation with the superior of the same character as belongs to the original feuar, or to a successor to the original feuar who becomes an owner of the feu, and there is, so far as I know, no midway between a person who is a security-holder and a person who is owner.

As I am at present considering the case, the defenders are security-holders, not owners in any way whatever, and therefore I am of opinion that they are not entitled under the contract to demand the right of having the feu-duty allocated, which is only to be enforced by the owner and his heirs or singular successors.

But there is another ground on which the defenders may resist the declarator of irritancy, which is, that they have acquired a title of ownership to the portions of the feu over which their original rights of security extended, and in that capacity they maintain under section 8 of the Act of 1874 that they are entitled to avail themselves of the right of allocation, and that contention, I think, is well founded.

The terms on which they can purge the irritancy depend entirely on the time at which they intimated the dispositions and asked to be admitted to the benefit of the clause of allocation. I am, therefore, for recalling the Lord Ordinary's interlocutor, and finding in place thereof that the defenders are entitled to the benefit of the clause in the contract under the 8th section of the Act of 1874 on such terms as may be adjusted, depending on the time when the dispositions in their favour were intimated to the superior.

LORD SHAND—This is an action in which

the pursuer seeks declarator of irritancy of the feu on the ground of the feu-duty being in arrear, and the arrears are stated on record in this way—"The arrears of feu-duty now due to the pursuer are as follows, *videlicet*, the sum of £33, 13s. due at the term of Whitsunday 1885, for the year preceding, and the like sum of £33, 13s. due at each term of Whitsunday thereafter." The original feuar not having appeared, certain bondholders have come forward to prevent declarator of irritancy being pronounced against them, and they are prepared to pay all that is necessary to prevent that.

It seems quite clear that a person holding a disposition of property, although he has not taken infeftment, is entitled to intimate such disposition to the superior and require that the feu-duty should be allocated. I am therefore of opinion that from the time the defenders made intimation of the dispositions in their favour, and demanded allocation, the feu-duty must be held as allocated. Now, I find in the print that in September 1884, that is, during the first period in which arrears were running, the agents for the bondholders sent the dispositions to the agents for the superior, and in the letter enclosing the dispositions added—"We have to request that you will write a memorandum of allocation upon the former of these dispositions, allocating thereon a feu-duty of £3, 5s. 0½d., and a memorandum of allocation upon the other disposition, allocating thereon a feu-duty of £3, 4s. 3d. In the meantime be so good as acknowledge receipt of the dispositions. We shall found upon the request now made, and decline payment of any further feu-duty than the sums so requested to be allocated." The reply to that letter is this—"We regret we cannot agree with you in this matter, and we suppose the Court of Session will have to settle the question at issue, which, however, cannot be tried until after Whitsunday next, when the next year's feu-duty becomes payable. We return the two dispositions sent in your letter." And that letter was followed by a reiterated letter by the bondholders in these terms—"We have yours of yesterday, returning the two dispositions which we sent you on the 30th ult., you will understand we shall found upon the request which has been made for allocation of the feu-duty."

Therefore in September 1884 an allocation of the feu-duty was demanded. There was then a year's feu-duty current, and accordingly the demand might perhaps not take effect till the following term, but it is at all events a competent and valid demand for allocation as at Whitsunday 1885, and so I am of opinion, so far at anyrate as the feu-duty from Whitsunday 1885 onward is concerned, that it must be held as allocated. It was suggested, no doubt as an answer to the claim for allocation, that the clause in the contract meant that there must be buildings on each piece of ground before allocation could be demanded, but that, I think, is clearly not so on the terms of the clause.

With regard to the other question, we had a full argument, both as to the point dealt with by your Lordship and also as to the effect of the Conveyancing Act of 1874, and I entirely agree in the result at which your Lordship has arrived, and in regard to the Conveyancing Act I think it quite unnecessary to decide any of the large questions argued, such as, whether the implied entry introduced by that Act applies to bondholders? I agree that whether entered or not with the superior the defenders have no right to take advantage of the clause in the deed which provides that "no composition or entry money or other casualty of superiority shall be exigible from any heir or from any singular successor in the said subjects or any part thereof." It appears to me that these words refer to successors in property to the feuar, and not to holders of securities over the lands feued. Apart from that, however, I think the succeeding clause is particularly clear. It provides that "heirs or singular successors acquiring right to any part or portion of the ground hereby feued shall be subject to the whole burdens conditions, provisions, declarations, and obligations contained in these presents and in the foresaid Acts of Parliament, and shall be bound to pay . . . annually, and at the term of Whitsunday, a rateable proportion of the *cumulo* feu-duty payable under these presents, for which proportion only they shall be bound." It appears clear that "acquiring right" does not mean acquiring a security, but a conveyance in property of some part of the ground, divesting the person granting it of all right therein. The very idea of an allocation suggests that it must be a proprietor who asks it, and not the mere temporary holder of a security, when perhaps a new allocation might be shortly required for a different bondholder, and perhaps subsequently for the owner. I agree accordingly in the conclusion at which your Lordship has arrived.

LORD ADAM—The Lord Ordinary in his note says—"The infeftment of creditors upon a bond and disposition in security is a mere burden upon the debtor's right, and therefore it is said that they are not his successors in any proper sense of the word. I should think this observation correct if the creditor's infeftment had not been confirmed by the superior." I entirely agree with the observation that "the infeftment of creditors upon a bond and disposition in security is a mere burden upon their debtor's right" and no more or less, and accordingly if the Lord Ordinary had not thought that the bond and disposition in security had been confirmed by implied entry under the Act of 1874, he would have arrived at a different result. I think whether the creditors are so entered or not is a question which it is unnecessary to decide. I think it a very difficult question, and that it would be unwise to express an opinion upon it, but assuming that the Lord Ordinary is right and that the creditors are entered with the superior, I cannot see why that should alter the nature of their right or convert it into a right of property. It appears that the right of the debtor is the

same after the entry of the creditor as before. He can sell and give the purchaser a title, and as I have said, the nature of the creditor's right is that it is just a burden on the right of the feuar.

Such being the nature of the creditor's right, let us now see how the provisions of the feu-contract apply to such a right. The parties who have a right to an allocation of the feu-duty are "heirs or singular successors acquiring right to any part or portion of the ground feued." If that be so, how can the creditors in right here who have not acquired a right to any portion of the ground, but merely a security over it, acquire the corresponding right to demand allocation of the feu-duty. So far from that being possible, I think a creditor never can acquire such a right under a bond and disposition in security. It is perfectly true that he can give an absolute right of property to another, but only in respect of the mandate he holds from the feuar who is the proprietor. He never can himself acquire a right to any part of the feu, and that being so, it appears conclusive of the case. Even assuming the bond to be confirmed, that puts the creditor under no obligations to the superior. He is not bound to pay him anything. No bond and disposition in security ever contains an obligation to pay the feu-duty to the superior, and if not, how is a bondholder under a bond and disposition in security entitled to demand from the superior an allocation of the feu-duty. Such a right cannot follow from any implied entry with the superior. No doubt he may be bound, and in this case is bound, to pay the feu-duty. But it is because he is an intromitter with the rents, and that fact alone which makes him liable for the feu-duty. He may give up possession to-morrow, and then there is no further obligation upon him to pay it.

I think the conclusions of the summons and the interlocutor of the Lord Ordinary show the position of matters very well. The only party who is a proper defender in the action is the proprietor of the feu—Peter Deans—and the parties who are creditors are merely called for their interest, and the only conclusion against them is one for expenses, in the event of their appearing and opposing the action. What the Lord Ordinary has done is that he has sustained the 2nd and 3rd pleas for the defenders other than Peter Deans, and assoilzied these defenders from the conclusions of the action, finding them entitled to expenses. The only effect of that is that they are not to be liable in payment of expenses. There is nothing in the interlocutor to prevent the pursuer taking decree in absence against Peter Deans, because notwithstanding the appearance of the creditors they are entitled to take decree against Deans.

Such being my views, I think the Lord Ordinary is wrong on the merits of the case in holding the defenders in their character of bondholders entitled to demand allocation of the feu-duty, but I am equally clear that from the date at which they intimated the dispositions, which really make them singular successors in portions of the feu, they are entitled on payment of the arrears of feu-duty to demand allocation.

LORD M'LAREN—My opinion is that the defenders in their character of bondholders are not vassals under the feu-contract founded on, and are not liable in payment of feu-duty under that contract, and consequently when they had no other title than that of heritable creditors, they were not in a position to demand allocation of the feu-duty, although for another reason they were under the necessity of paying the same.

It seems impossible to read the clause in the contract without seeing that the right to demand and the obligation to pay were correlative, and that no one was entitled to demand an allocation of the feu-duty save the feuars who were bound to pay it; and on that ground I agree with your Lordships that the defenders as bondholders were not entitled to demand allocation.

The Lord Ordinary has expressed his opinion that the provisions of the Act of 1874 with regard to implied entry extend to heritable creditors. I will only say that I do not wish to be understood as concurring in the view so expressed by the Lord Ordinary. As the point was argued, I have given a good deal of consideration to it and have a view with regard to it, but I do not desire to express it, because it is a very likely point to come up in another case, and one not necessary to decide here.

The defenders by an equitable rule are entitled to avoid forfeiture of their bond by tendering payment of the whole feu-duty, which may be due at the time the demand is made upon them. The result will be that they will be entitled to an allocation of the feu-duty from the time they came into possession as *ex facie* absolute owners. Previously they had no such right, but were entitled to come forward to prevent forfeiture of their bonds by payment of the whole feu-duty.

The Court recalled the interlocutor of the Lord Ordinary and in respect of the payment to the pursuer in name of feu-duty and interest of the sum of £17, 15s. 7d. by the defenders, the trustees of the deceased John Kinross, in respect of the subjects contained in the disposition in their favour, and of the sum of £17, 19s. 7d. in name of feu-duty and interest by the defenders Mrs Robertson, Mrs Carslaw, and the executors of Mrs Buchanan, in respect of the subjects contained in the disposition in their favour, found that the irritancy incurred in so far as it concerned the defenders other than Peter Deans had been purged: Therefore dismissed the action as against said defenders other than Deans, and decerned.

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